



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

November 6, 1997

Mr. Julian W. Taylor III  
The Law Office of Wallace Shaw, P.C.  
P.O. Box 3073  
Freeport, Texas 77542-3073

OR97-2454

Dear Mr. Taylor:

You have asked whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 109869.

The City of Clute (the "city"), which you represent, received various requests for information concerning the city's wastewater treatment plant and Burns Environmental Services ("Burns"). You have provided some of the information requested but assert that other responsive documents are excepted from disclosure pursuant to sections 552.103 and 552.108 of the Government Code. The documents you seek to withhold from disclosure were submitted to this office and identified as "AA", "B", "C", "D", and "E".

You state that the city does not have some of the information requested. We note that the city has an obligation to make a good faith effort to locate requested records. Open Records Decision No. 561 (1990) at 8. However, the city is not obligated to provide information which is not in its possession or to compile new information.<sup>1</sup> Open Records Decision Nos. 561 (1990) at 9 (city does not have to obtain new information), 483 (1987) at 2, 452 (1986) at 3 (open records request applies to information in existence when request is received), 362 (1983) at 2 (city does not have to supply information which does not exist).

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<sup>1</sup> The requestor, in correspondence to this office dated August 27, 1997 asserted that a "letter of permission issued by an authorized agent of the city, which should be regarded as a permit" was not provided to him. You have informed this office that the "[c]ity complied in full" with the request for permits. We note that since such a letter is not included in the documents the city seeks to withhold, we assume it either does not exist or has already been provided to the requestor. We also note that the city should clearly inform the requestor when requested information is not in the city's possession or does not exist.

You assert that the documents at issue are protected from disclosure pursuant to section 552.108 of the Government Code, which provides that:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from the requirements of Section 552.021 if:

(1) release of the information would interfere with the detection, investigation, or prosecution of crime;

(2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication; or

(3) it is information that:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) reflects the mental impressions or legal reasoning of an attorney representing the state.

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from the requirements of Section 552.021 if:

(1) release of the internal record or notation would interfere with law enforcement or prosecution;

(2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication; or

(3) the internal record or notation:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) reflects the mental impressions or legal reasoning of an attorney representing the state.

You assert that the city has conducted an investigation into possible criminal activity and state:

The City claims that, although the Criminal District Attorney of Brazoria County has thus far refused to accept charges based on the investigation represented by [information submitted to this office] the potential for criminal charges to be filed still exists because the statute of limitations has not yet run.

Based on the information provided, you have not shown the applicability of section 552.108 to the records at issue.

You have also asserted that section 552.103(a) is applicable to the information at issue. To show that section 552.103(a) is applicable, a governmental entity must show that (1) litigation is pending or reasonably anticipated and (2) the information at issue is related to the litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. The governmental entity must meet both prongs of this test for information to be excepted under section 552.103(a).

You assert that the city reasonably anticipates litigation. You supplied to this office a notice of claim from Burns, asserting that actions by the city and its agents resulted in \$750,000 damage to the company. This claim was denied by the city's insurance carrier. You state that the denial of the claim is an affirmative representation that the notice of claim complied with the notice provisions of the Texas Tort Claims Act, Civ. Prac. & Rem. Code ch. 101, in compliance with Open Records Decision No. 638 (1996). Open Records Decision No. 638 (1996) concluded that a governmental body could show that litigation is reasonably anticipated if it has received a claim letter and also represents to this office that the letter is in compliance with the notice requirements of the Texas Tort Claims Act. Based upon our understanding that this is what you are representing, we agree that the city has shown that litigation is reasonably anticipated.

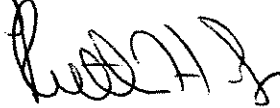
We have reviewed the records submitted to this office and agree that the documents labeled "AA", "B", "C", and "D" are, on their face, related to the anticipated litigation. These documents may be withheld from disclosure under section 552.103(a), provided that the opposing party to the anticipated litigation has not already seen or had access to these documents. The applicability of section 552.103(a) ends once the litigation has concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

However, it is not apparent that "E", the draft report, is related to the subject of anticipated litigation, nor have you explained its relationship. Thus, "E" may not be withheld from disclosure under section 552.103(a).

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous

determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink, appearing to read 'Ruth H. Soucy', written over a horizontal line.

Ruth H. Soucy  
Assistant Attorney General  
Open Records Division

RHS/ch

Ref.: ID# 109869

Enclosures: Submitted documents

cc: Mr. David Burns  
Burns Environmental  
P.O. Box 51  
Lake Jackson, Texas 77566  
(w/o enclosures)